



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JULY 19, 2022

IN THE MATTER OF:

Appeal Board No. 622118

PRESENT: MICHAEL T. GREASON, MEMBER

In Appeal Board No. 622118, the Commissioner of Labor appeals from the decision of the Administrative Law Judge filed March 11, 2022, which sustained the initial determination charging the claimant with an overpayment of \$1,436.50 in benefits recoverable pursuant to Labor Law § 597 (4), as modified

to be effective March 23, 2020 through June 21, 2020 and non-recoverable.

In Appeal Board No. 622119, the Commissioner of Labor appeals from the decision of the Administrative Law Judge filed March 11, 2022, which overruled the initial determination reducing the claimant's right to receive future benefits by 112 effective days and charging a civil penalty of \$215.47 on the basis that the claimant made willful misrepresentations to obtain benefits.

At the combined telephone conference hearing before the Administrative Law Judge, all parties were accorded a full opportunity to be heard and testimony was taken. There was an appearance by the claimant.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant worked two jobs, working two days per week for each employer. One employer was an event planner. The other employer was a numismatist and seller of precious metals. With the onset of the COVID-19 pandemic, the claimant lost her job with the event planner, and the numismatist put her on a paid furlough. Because she had lost one of her jobs entirely, the claimant filed a claim for benefits on April 24, 2020, effective March 16, 2020. Even though the claimant performed no work, the numismatist

continued to pay the claimant her regular pay of \$240.00 per week from mid-March 2020 until she returned to work in September 2020.

For the weeks ending March 29, April 5, April 12, and April 19, 2020, the claimant filled out an online claim form indicating she was eligible for benefits each week. The form explained that stating she was eligible each week meant, among other things, that she did not work any day that week, including in self-employment.

For the weeks at issue between the week ending April 26, 2020 and the week ending September 27, 2020, the claimant certified online. When certifying each week, she was asked how many days she had worked, including self-employment, during the week for which she was certifying. With respect to the weeks ending April 26, 2020 through June 7, 2020, the claimant certified that she had worked zero days each week. With respect to the week ending June 21, 2020, the claimant certified that she worked one day, although she did not work that week.

Upon returning to work for the numismatist, the claimant worked two days in the week ending September 20, 2020 and certified that she worked three days that week. In the week ending September 27, 2020, the claimant worked two days, and she certified that she had worked two days.

The claimant received \$1,436.50 in benefits.

OPINION: In 022-02886, the Administrative Law Judge ruled that the claimant was ineligible for benefits, effective March 23, 2020 through September 27, 2020, on the basis that the claimant lacked total unemployment. As the claimant has not appealed from that decision, the Judge's decision is binding upon us.

Pursuant to Labor Law § 597 (3), any determination regarding a benefit claim

may, in the absence of fraud or willful misrepresentation, be reviewed only within one year from the date it is issued because of new or corrected information. The Department of Labor initially redetermined the claimant's right to benefits by Notice of Determination dated December 17, 2021. Therefore, the Department possesses jurisdiction to redetermine the claimant's right to benefits for dates prior to December 17, 2020 only if the claimant made a willful misrepresentation.

The credible evidence establishes that, when the claimant certified for benefits each week, she either certified accurately or she overreported the number of days that she worked. On her online claim form, she accurately reported that she did not work any day, including self-employment, during the weeks ending March 29, April 5, April 12, and April 19, 2020. She also certified to working zero days each week from the week ending April 26, 2020 through the week ending June 7, 2020. In addition, we accept the claimant's credible testimony that, in certifying to working one day during the week ending June 21, 2020, she inadvertently overreported her days of work, as she in fact did not work that week. We are not persuaded by the Commissioner of Labor's contention that the claimant should be held to have made knowingly false certifications because she did not report that she was being paid for two days of work. We have previously held that a failure to report being paid while not working does not constitute a false certification when the claimant was never asked about such pay (see Appeal Board No. 619563). As the claimant was performing no services for an employer, the claimant's certifications to working zero days were not factually false. At most, the claimant's certifications reflect an incorrect legal conclusion, which is not a basis for finding a willful misrepresentation (see *Matter of Valvo*, 57 NY2d 116, 127-128 [1982]). Finally, the record establishes that the claimant overreported her days of work for the week ending September 20, 2020 and certified accurately for the week ending September 27, 2020. Because the claimant never underreported her days of work, the claimant did not make factually false certifications to obtain benefits. Therefore, her certifications were not knowingly false, and her certifications do not constitute willful misrepresentations. The authorities cited by the

Commissioner of Labor on appeal do not support a different result, as those cases involved factually false certifications to obtain benefits. Accordingly, we conclude that, as there is no willful misrepresentation, the claimant is not subject to a forfeiture penalty or civil monetary penalty. We further conclude that, with no willful misrepresentation, there is no jurisdiction to redetermine the claimant's benefits, and the claimant is not chargeable with a recoverable overpayment.

DECISION: The decisions of the Administrative Law Judge are modified as follows and, as so modified, are affirmed.

In Appeal Board Nos. 622118 and 622119, the initial determinations, charging

the claimant with an overpayment of \$1,436.50 in benefits recoverable pursuant to Labor Law § 597 (4); and reducing the claimant's right to receive future

benefits by 112 effective days and charging a civil penalty of \$215.47 on the basis that the claimant made willful misrepresentations to obtain benefits, are overruled.

The claimant is allowed benefits with respect to the issues decided herein.

MICHAEL T. GREASON, MEMBER